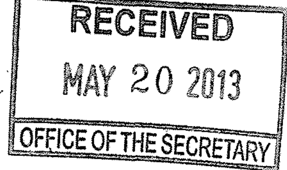


United States of America
Before the
Securities and Exchange Commission

Securities Exchange Act 1934
Release No. 67748 / August 29, 2012

Administrative Proceeding
File No. 3-14999

In the Matter of

ANGELICA AGUILERA,

Respondent.
______________________________________/

**RESPONDENT ANGELICA AGUILERA'S REPLY TO THE SECURITIES AND EXCHANGE COMMISSION'S POST HEARING BRIEF**

Respondent Angelica Aguilera, by and through her undersigned attorney, hereby files her Reply to the Securities and Exchange Commission's Post Hearing Brief and in support thereof further states:

1. The U.S. Securities and Exchange Commission (hereinafter, the SEC) has failed to meet its burden of proof in showing that Respondent Ms. Aguilera (hereinafter, Ms. Aguilera) failed reasonably to supervise Fabrizio Neves and Jose Luna as they allegedly executed a fraudulent interpositioning scheme involving structured note transactions.

**THE COVER UP PREVENTED DISCOVERY OF THE FRAUD**

2. Throughout trial and in its Post Hearing Brief, the SEC inadequately addresses the effect that the alleged cover up in this matter, i.e., the alteration of the structured note term sheets, would have upon generating reasonable notice that something was amiss.



Orig Sig

3. On opening statement, Ms. Aguilera implored the factfinder to question whether the cover up would have effectively prevented any reasonable supervisor from uncovering the fraud. *Hearing Transcript Record* (herinafter, "*R.* ") at 47-49.

4. Concealment and cover ups in securities fraud justify extending applicable statutes of limitations, as wrongdoers' efforts to hide the wrongdoing can result in years to unravel and discover the truth. The 11th Circuit Court of Appeals applies this rationale in *Tello v. Dean Witter Reynolds, Inc.,* 410 F.3d 1275 (Fed. 11th Cir., 2005) in its analysis and comparison of inquiry notice and actual notice. The court cited the statement of Senator Leahy and Former SEC Chairman Arthur Levitt that

> extending the statute of limitations is warranted because many securities frauds are inherently complex, and the law should not reward the perpetrator of a fraud, who successfully CONCEALS its existence for more than three years." *Id.* at 1285-1286 (emphasis added).

5. The effect of a cover up as preventing the discovery of securities fraud, and so often an integral part of the fraud, have caused blue sky statutes to explicitly prohibit them. Florida's securities fraud statute provides that it is illegal "....to knowingly and willfully falsify, **CONCEAL, OR COVER UP** ....a material fact. Florida Statute 517.301(1).

6. Florida's treatment of an illegal cover up in a fraudulent securities matter is seen in *Whigham v. Muehl,* 500 So.2d 1374, 12 Fla. L. Weekly 289 (Fla. App. 1 Dist., 1987). In *Whigham,* Florida's First District Court of Appeal treated a seller's refusal to provide business records to a buyer as a cover up or concealment. *Id.* at 1378-1380.

7. The SEC Post Hearing Brief inaccurately describes FINRA's discovery of the fraud. The SEC wants the Court to believe that "(f)rom the review of the trade blotter, FINRA identified excessive markups and markdowns in structured note trading for the

two Brazilian funds…." *Division of Enforcement's Post Hearing Brief* at 18. This, however is not quite correct.

8. A closer reading of FINRA's trial testimony is required. Identification *and confirmation* of the improper markups and markdowns could have been accomplished only through pricing information received by FINRA from the issuers.

> **Q. Did FINRA obtain indicative pricing information from certain issuers to determine that the markups were in fact excessive?**
> A. Yes. One of the things that we did once we identified the significant variations in prices (from the analytics) from which the issuer issued them to the firm's – let me take step back. When the firm purchased it in a riskless principal account – and I will use an example. They purchased it at 60. We then saw that that same product was sold to the Brazilian fund at 95. We contacted various individuals on the street at Barclays and, I believe, Commerce Bank and asked them what would have been the price on this particular day. And representatives from Barclays and Commerce Bank had indicated that it would have been 60. There was no reason for the significant fluctuation in price that we were seeing on the LatAm trade blotter.
> *R.* at 267-268.

9. It is wrong for the SEC to inartfully state that "(f)rom the review of the trade blotter, FINRA identified excessive markups and markdowns…."

10. It is impossible to calculate and know what the markups and markdowns were without knowing what the price was at the issuer. This, of course, could not have been known through a reasonable inquiry as the pricing data had been altered in the term sheets as part of the cover up.

11. Clearly, pricing information would be relevant only to the initial offering and would be further obfuscated by the structured note being sold to the end buyer only on the secondary market. As compliance consultant Mr. Landers explained to the factfinder,

> There is no way for us (compliance consultants) or the regulators to know at that particular time (on the secondary market) by looking at the ticket if that particular ticket is a structured note or not….We did look at trade confirmations. And for us, again, the same is with the regulator. It didn't ring any bells. The

> reason it didn't ring any bells is because when a trade is done, you would see the description of the security being put on the confirmation and on the statement of the claim.
>
> The issue that had to be dealt with is the price that's done, what price, and is that a fair price because you are dealing with an issue here where there is a trace record. THERE IS NO MARKET. THERE IS NOTHING BEING QUOTED. IT IS STRICTLY PARTY-TO-PARTY TRANSACTION (emphasis added)....So if I am looking at the ticket and I look at the confirm, I am looking to see if the description is the same and the price is the same.
>
> If those match, whether it is me, whether it is FINRA, or an examiner from the SEC, the issue that you have to deal with is the evaluation of the note in the secondary market. *R.* at 332-224.

12. Altering the structured note term sheets was effective in concealing the fraudulent scheme. Mr. Luna testified that the price changes on the term sheets prevented discovery of the scheme by the end buyer and by Pershing Clearing. *Hearing Transcript Record* (hereinafter, *"R."*) at 239.

13. Mr. Luna further testified that on the instructions of Mr. Neves, no one at Latam should know about the altered term sheets to include Ms. Aguilera. *Luna Testimony* at 244-245.

14. Another cover-up related to the fraud involved Mr. Luna's and Mr. Neves' opening of nominee accounts ultimately controlled by the perpetrators of the fraud and where the securities were "interpositioned" prior to sale to ultimate end customers. Part of the cover up included fraudulently preventing anyone's knowledge of the ultimate ownership and control of the nominee accounts. Mr. Neves wanted the accounts opened "(s)o he can compensate me (Luna) without the firm knowing." *R.* at 245. This prevented both LatAm and Ms. Aguilera knowing about improper payments made to Mr. Luna by Mr. Neves.

15. Mr. Landers as the compliance consultant stated that "(w)e did not note anything irregular with structured notes…" including after asking to see the prospectus and term sheet. *R.* at 331.

16. FINRA's Mr. Hartofilis stated that he did not know whether the alterations to the term sheets would have prevented a reasonable supervisor from discovering any improprieties. *R.* at 273.

17. Mr. Konig's opinion as to how the scam could have been discovered is directly related to the pricing information.

> The alteration would not bring any supervisory—the operation (sic), per se, would not bring any questioning of a supervisor. But if a supervisor had seen how that note was originally purchased at – which was much below the altered price – and how it traded in these accounts that were—now I know—that were controlled by some people, then the supervisor should have realized that there was something wrong. *R.* at 589.

Thus, discovery of the fraud, according to Mr. Konig, Mr. Landers and FINRA'S Mr. Hartofolis would depend upon knowing the pricing information. That information however would have been impossible to find in the altered term sheets, and would have to be found at the issuer.

## RESPONSIBILITY, ABILITY AND AUTHORITY

18. The SEC fails in providing clear and convincing evidence or a preponderance of the evidence that Ms. Aguilera failed to reasonably supervise. Supervision requires an inquiry of "….whether, under the facts and circumstances of a particular case, that (supervisor) has a requisite degree of responsibility, ability or authority to affect the conduct of" employees. *In the Matter of Gutfreund*, Exchange Act Release No. 31554, 1992 WL 362753 at *15 (1992).

19. Here, Ms. Aguilera clearly lacked the ability and experience to supervise trading. The evidence shows that Ms. Aguilera had no experience in trading supervision and no experience in trading. Ms. Aguilera had never placed a securities trade in her life.

20. The Written Supervisory Procedures (WSP's) did not accurately reflect job responsibilities. As President and FINOP, Ms. Aguilera's job was primarily administrative, human resources, and marketing. The WSP's showing her with a secondary responsibility in trading supervision were incorrect.

21. Ms. Aguilera took action to correct the WSP's. Around May 2009, Ms. Aguilera told Mr. Vera, who was primarily responsible for Review and Updating Supervisory and Compliance Procedures, to correct WSP's to accurately reflect Marcos Konig as Branch Manager, CEO and to accurately reflect that Aguilera did not have secondary responsibility for securities transactions and mark-ups and mark-downs.

22. Mr. Vera said the WSP's would be corrected , "....as we go along."

23. Around August 2009, ACA Compliance Services and its managing director Francois Cooke were hired as a compliance consultant by LatAm and Mr. Acosta. Aguilera told Mr. Cooke to correct the WSP's. *R.* at 667-668.

24. Between September 11 and September 16, 2009 Mr. Cooke sent a redlined update of the WSP's to Mr. Vera with a carbon copy sent to Ms. Aguilera, Mr. Acosta and Mr. Konig. Mr. Vera sent a copy of the WSP's from Mr. Cooke to Mr. Landers for his review.

25. The final WSP's, titled "Revised 09/2009" listed Ms. Aguilera with the title of, "President, Financial and Operations Principal." Correctly reflecting Ms. Aguilera's lack of trading experience, the Revised 09/2009 WSP did not list Review and Approval

of Securities Transactions in either Ms. Aguilera's Primary or Secondary Supervisory Responsibilities. Similarly, Ms. Aguilera's responsibilities for Review and Approval of Mark-Ups, Mark-Downs and Commissions have been removed from the Revised 09/2009 WSP. *DX 24* at 214-215.

26. Other corrective actions taken by Ms. Aguilera include the hiring of Mr. Konig in June 2008. The SEC disputes that Mr. Konig reviewed trade blotters. *SEC Post Hearing Brief* at 27. The SEC offers Mr. Vera's testimony as proof that Mr. Konig did not review the trade blotter. *Id.* This is surprising given Mr. Vera's lack of credibility and veracity.

27. Mr. Konig had previously testified that he reviewed trade blotters for the clear-through business and "....more so as the options principal, I reviewed and handled all of the new accounts and all the requirements for accounts that needed to have options." *Investigative 24, 2010 Investigative Testimony of Marcos Konig,* at 41.

28. It is important to note that one of the accounts reviewed and supervised by Mr. Konig as an options principal was one of the nominee accounts in question, that of Punch Development Ltd. The options activity was extraordinarily high: On February 11, 2009, for example 450 put options were bought in the account.

29. Showing the effectiveness of the cover up involving the account, even the experienced Mr. Konig, in reviewing the options activity, found nothing untoward about the account, despite it having funds available of $5,068,772.25.

30. Turning to "authority," the final prong of the *Gutfreund* supervision test, both authority and responsibility here must turn on whether Ms. Aguilera had control at LatAm.

31. Ostensibly and conveniently, Mr. Acosta left the company as President and Chief Compliance Officer in October 2007, yet remained in control of the firm, together with Mr. Neves, while Mr. Acosta worked for the company as a "consultant' until May 2009 when he returned as a principal.

32. Importantly, fixed income/structured note trades that FINRA inquired about in March 2010 are as follows:

- Red Maple Ltd., trade date 111406,
- Red Maple Ltd., trade date 111506,
- KBC IFIMA NV, trade date 011607,
- Deutsche Bank AG, trade date 040407,
- Lehman Brothers Trsy Brazil Zero, trade date 052907,
- Lehman Brothers Treasury Co B, trade dates 070708, 080708, 080808, 081208, 081508,
- Commerzbank AG, trade dates 070609, 072409,
- Barclays Bank PLC Var. Rate Notes, trade dates 080409, 081009,
- Standard Bank PLC Euro Med. Term Notes, trade dates 082509, 090109

33. Ten of these trades took place while Mr. Acosta was the President and Chief Compliance Officer until October 2007. Six of the trades took place after Mr. Acosta had returned as principal of LatAm in May 2009. Following his return, Mr. Acosta's trade supervision is evidenced by his July 22, 2009 email to Ms. Acosta in which he said, "Tomorrow I need to be in the office. I need to help fix a problem with a trade." *RX* 5.

34. The trade that Mr. Acosta needed to fix was a July 2009 Commerzbank note trade.

35. Thus only the Lehman Brothers trades of 2008 and the JP Morgan structured note transactions of 2008 (*SEC Post Hearing Brief* at 15) (not included in the FINRA March 2010 inquiry) took place when Mr. Acosta was "not" at the firm but working as a "consultant."

36. Even while working at LatAm as a consultant, Mr. Acosta retained and exercised actual control of the firm. Testimony from witnesses called by the SEC showed that Mr. Acosta and Mr. Neves controlled the firm and Ms. Aguilera. Showing that Mr. Acosta's activity at LatAm as "consultant" was significant, Mr. Landers testified that

> .... "(b)y having him as a consultant, he was still able to be active in the firm and get paid for his time doing it....(T)he services that he was providing were not too much different than what he was doing while he was employed, except that he was not a signatory of the firm. He was not able to sign off for the firm. He was not able to represent the firm in a legal capacity....Mr. Acosta was still involved on a day-to-day basis. But I don't know if his involvement was more or less. But he was certainly there. He was traveling around a lot, but he certainly still made his presence known to the firm.
>
> *R.* at 282-283.

37. Angelica didn't have authority to fire Esdras Vera regardless of her title. The company was controlled of Maximino Acosta and Fabrizio Neves. Rebutting the SEC's assertion that neither Acosta nor Neves had actual control at LatAm (*SEC's Post Hearing Brief* at 25), the following email string confirms Acosta's and Neves' control and authority::

> Maximino Acosta to Fabrizio Neves:
>
> Hi Fabrizio
>
> I need a good person on the desk. I would love to count on Lucho but when you need him everything stops all other business gets put on hold. I understand this is your business come first. If I'm going to sell Latam, we need back up. Its good to be on vacation but when was the last time you saw me take 10 days. I hired Marcus son. Over 10 years of trading with online trading systems.
> At the end of the day this is your company I work for you. If you want me to fire everyone I will do so.
> I don't want to spend your money. I do want to grow a real company. I know you want a real company too. A company that you can sell for 300 to 400 million.
> You give me guys like Paul Esdras Martha Carlos Morris people that are not looking out for you. But I deal with them because you ask me to.

So Fabrizio tell me what you would like me to do.
I want you to do something for me. The next to me someone comes to you with a problem on how the company is being run ask them what is the solution how can they do things better. I bet you they don't have and answer.

Neves to Acosta:

Jimmy:

I believe that you are right, go ahead, go luck, You know how to get things done and I trust in you...
I had a terrible day yesterday....

Best Regards,
Fabrizio

Esdras Vera to Acosta, Angelica Aguilera, and Marcos Konig

Jimmy, it is a shame that inadvertently you send this to Angelica's Latam email perhaps by mistake – but critically creating a paper trail of discussions that should never be carried out through the firms server:
Feel free to contact me if you have any questions whatsoever on the context of your questions.
Esdras

*Email string between Acosta, Neves and Vera*, July 1, 2009

**MR. ACOSTA AND MR. NEVES CONTROLLED LATAM**

38. Evidence presented by witnesses called by the SEC shows that Mr. Maximino Acosta retained and exercised effective control over LatAm and that Mr. Neves held and exercised *de facto* control over the firm.

**39.** According to Mr. Luna, Mr. Vera was the principal responsible for trade ticket and trade blotter review. *R.* at 250. Mr. Luna further believed Mr. Neves to be biggest shareholder of LatAm. *Id.* at 251.

40. Mr. Luna believed Ms. Aguilera to be the boss of "....vacations. Employee vacations, salary increase, if anything goes wrong in the company. It depends on the

situation." *Id.* at 252. Mr. Luna denied that Ms. Aguilera was the boss of trading and believed that the boss of trading was Mr. Neves. *Id.*

41. According to Mr. Landers, the NASD/FINRA was concerned about Ms. Aguilera's lack of experience as a FinOp and in compliance. *R.* at 306-308.

42. Mr. Konig stated that "....one of the things that happened at the firm is that titles were changed and exchanged frequently." *R.* at 571.

43. Mr. Acosta clearly maintained control of the firm and of Ms. Aguilera. The voting trust was a sham and Ms. Aguilera felt highly pressured by Mr. Acosta. According to Mr. Konig, "....there would be decisions that he (Acosta) would make that sometimes made Ms. Aguilera cry." *R.* at 595.

44. Mr. Konig further testified that "....I couldn't understand why Ms. Aguilera acted in such a way at the request of Mr. Neves. And that's when, more or less, I understood that he (Neves) had more control de facto than they did." *R.* at 597.

45. Regarding Ms. Konig's opinion of Ms. Aguilera role as a "rainmaker" while president, he testified that she, together with Mr. Acosta and Mr. Konig, was effective in resolving a serious issue with Pershing Clearing. *R.* at 603. Mr. Konig also admitted that Ms. Aguilera was influential and that she performed well as a president in soliciting Biscaine Capital Group, an organization currently with $800 million under management. *R.* at 601-602.

46. Ms. Aguilera received sump sums in 2009 include $200,000 of a $275,000 loan from Mr. Neves in 2007 under terms of a promissory note. After paying back $75,000 of the loan, Neves issued a 1099 to Ms. Aguilera for the $200,000 balance (not a part of the agreement).

47. Ms. Aquilera never expensed out the home office construction to LatAm. Additionally, Ms. Aguilera never expensed out any of the home improvements needed as requirements for her disabled son. Ms. Aguilera personally assumed all the expenses. Checks paid out of the firm to the various vendors were clearly recorded as income payments to Ms. Aguilera in her income tax filing as "distributions of capital," totaling $224,377.74.

48. Additionally, Ms. Aguilera had fallen behind on a mortgage loan she had taken on her primary residence to create LatAm. Mr. Acosta, believing that her credit problems were also negatively affecting the company, ordered her in an August email to pay off the mortgage with a payment from LatAm to her, also declared as a distribution of capital in the amount of $300,000.

49. Another 2009 lump sum payment, declared as income to Ms. Aguilera, was made by LatAm directly to the IRS for $305,845.00 for her 2008 taxes which were mostly for LatAm's corporate taxes.

50. As LatAm's president, Ms. Aguilera's effectiveness in marketing and bringing in new business is evidenced by her success in soliciting Biscayne Capital Group (currently continuing with Mr. Konig and eventually growing to $800 million under management). Ms. Aguilera's success as an administrator and executive was shown by the preservation of LatAm's professional relationship with Pershing Clearing following a falling out caused by Mr. Vera . *R.* at 601-103.

51. 2008 and 2009 marketing trips made by Ms. Aguilera as President included visits to Renato Nobile, Carlos Ferrari, Banco Cruzeiro do Sul, Planner Investment Banking, Terra Fururos, Banco Modal, Gloval Gestao en Saude in Brazil; Casa de bolsa,

Finamex, Interacciones in Mexico; Victor Paullier & Cia. in Uruguay; TPCG Group, CGM in Argentina. She also visited high net worth private clients and prospects of a smaller broker.

## CONCLUSION

52. The SEC has not overcome its burden in showing whether the alleged fraud could have been discovered or prevented by Ms. Aguilera in light of the evidence showing intentional concealment and cover-up of the fraud.

53. Here, in alleging failure reasonably to supervise, the SEC has neither clearly and convincingly, nor by a preponderance of the evidence, shown that Ms. Aguilera was ***in reality*** a supervisor responsible for the trading actions of Mr. Neves and Mr. Luna. In addition, the SEC has failed to show *who* ultimately *was* in charge of Neves and Luna. WHEREFORE, Respondent Angelica Aguilera respectfully requests that the Court find in her favor and that this proceeding be dismissed with respect to Ms. Aguilera. Respondent requests that allegations of failure to reasonably supervise be dismissed as possible fraud and wrongdoing by Neves and Luna contained as part of the fraud the concealment and cover up of facts by Neves, Luna and others that would prevent discovery. Respondent further requests that she be awarded her costs and fees associated with the defense of this matter and for whatever other relief that the Court finds just and equitable.